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Administrative Rulemaking and Judicial Review: Some Conceptual Models

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I. INTRODUCTION

A number of observers presently believe that much federal rulemaking has become unduly complex, time-consuming, costly, and unwieldly,[1] primarily because of the transformation of judicial review of rules promulgated after informal procedures into review on the administrative record. Former dean Carl Auerbach, for example, believes that this change in judicial review in the last decade has profoundly and adversely affected the rulemaking process on the administrative level.[2] Auerbach suggests that requiring an agency to prepare a defense to all potential challengers of a proposed rule, regardless of the actual number or content of the challenges, imposes unnecessary costs and delays upon rulemaking,[3] and places additional burdens on courts that must cope with the voluminous and incoherent records generated by such procedures.[4] William Pedersen expressed a similar concern about the volume

* Professor of Law, University of Minnesota.

1. The most articulate statement of this position is found in Auerbach, *Informal Rule Making: A Proposed Relationship Between Administrative Procedures and Judicial Review*, 72 NW. U.L. REV. 15, 60-61 (1977). Justice Rehnquist evinced a concern that informal rulemaking proceedings remain free from court-imposed trial-type procedures and that the use of Administrative Procedures Act § 553 proceedings be expanded. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 453 U.S. 519, 542-49 (1978) (discussing 5 U.S.C. § 553 (1976)); United States v. Florida E. Coast Ry., 410 U.S. 224 (1973). Professor Nathanson cautiously warned that the ramifications of an expansive on-the-record approach to informal rulemaking would produce adverse effects upon that process. *See* Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 AD. L. REV. 377, 403-05 (1978). *See also* Action for Children's Television v. FCC, 564 F.2d 458, 477 (D.C. Cir. 1977). William Pedersen suggested that rulemaking processes at the administrative level have been insufficiently disciplined and as a result an unduly severe review burden has been imposed on the courts. *See* Pedersen, *Formal Records and Informal Rulemaking*, 85 YALE L.J. 38, 71-73 (1975).

2. Auerbach, *supra* note 1, at 60-61.

3. *Id.*

4. *Id.* at 60.

and incoherence of the administrative records upon which courts have been required to review environmental rules.[5]

Justice Rehnquist, another articulate critic of the administrative process, believes that the primary factor impairing the efficiency of federal rulemaking proceedings is the incorporation of cross-examination and other procedural devices drawn from the judicial tradition. Rehnquist's opinions in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*,[6] *United States v. Florida East Coast Railway*,[7] and *United States v. Allegheny-Ludlum Steel Corp.*[8] were directed towards eliminating evidentiary hearing procedures in agency rulemaking, although he apparently favors the review-on-the-record approach to informal rulemaking.[9] Nevertheless, the tendencies of the lower federal courts to order agencies to employ time-consuming trial-type procedures in rulemaking proceedings have been the result of an on-the-record approach to judicial review of informal rulemaking.[10]

The problems associated with judicial review on the rulemaking record and the circumstances in which such review is appropriate are thus ripe for reassessment. After discussing the Supreme Court's recent approach to rulemaking review and the problematic assumptions underlying this approach, this Article will analyze Carl Auerbach's proposed procedure for rulemaking review and the problems raised by his proposal. A discussion of several models of rulemaking procedures and judicial review of such procedures provides the basis for this analysis. Finally, this Article will suggest that further empirical

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5. Pedersen, *supra* note 1, at 51-60.
6. 435 U.S. 519 (1978).
7. 410 U.S. 224 (1973).
8. 406 U.S. 742 (1972).
9. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. at 549 (citing Camp v. Pitts, 411 U.S. 138, 143 (1973)); note 29 *infra*.
10. Professor Nathanson examined several lower court cases and commented:

> [T]he apparent freedom of the section 553 proceeding has now become at least partly illusory. Once those [section 553] proceedings . . . were treated not merely as a source of education for the agency but also as the record basis for judicial review, it became necessary to infuse them with additional procedural safeguards. It is hardly surprising, therefore, that some of the basic principles of sections 556 and 557 have been grafted onto informal rulemaking proceedings, both to assure the essentials of due process and to provide an intelligible basis for judicial review.

Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721, 756 (1975).

study of the development of federal administrative law is necessary to determine the types of new procedures that would best improve judicial review of agency rules.

II. JUDICIAL REVIEW ON THE RULEMAKING RECORD: PROBLEMS AND APPROPRIATENESS

Judicial review of rules on the record of the rulemaking proceeding requires that all material relevant to assessing the validity of the rules, including "factual" material, be found in the administrative record. Thus, people who wish to attack the validity of an administrative rule in court will find it necessary—or almost necessary—to participate in the rulemaking proceeding to lay the foundation for a judicial challenge to the rule. Judicial review on the rulemaking record thus presumes a role for the informal rulemaking proceeding beyond its historic function as a device for collecting information for the agency.[11] Judicial review on the record requires the informal proceeding to adopt a role similar to the role that formal rulemaking has traditionally played: it is the initial adversarial arena in which all of the affected interests assert their respective concerns and underlying factual contentions and critique those of their adversaries.[12]

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11. *See* ATTORNEY'S GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, FINAL REPORT, S. DOC. NO. 8, 77th Cong., 1st Sess. 101-02 (1941) [hereinafter cited as FINAL REPORT]. The authors of the FINAL REPORT concluded that normally the purpose of rulemaking proceedings is "to enlighten the administrative agency and to protect private interests against uninformed or unwise action." *Id.* at 108. *See also* Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, the Rulemaking Process*, 60 IOWA L. REV. 731, 845-48 (1975); Gifford, *Report on Administrative Law to the Tennessee Law Revision Commission*, 20 VAND. L. REV. 777, 786-87, 791-92 (1967); Nathanson, *supra* note 10, at 754-55 (1975). *See generally* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 31-32 (1947); 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 6.01-.02 (1958).

12. *See* the description in the FINAL REPORT:

> It may be clear in advance which interests will benefit and which will suffer if proposed regulations are issued. Low-cost producers as against high-cost producers with respect to maximum prices or minimum wages; workers as against employers with respect to wages or working conditions; buyers as against sellers with respect to the regulation of agricultural marketing; the makers of machinery which will be barred by proposed safety regulations as against others whose product will be lawful; these are recurring divisions of interested parties which from time to time confront an administrative agency engaged in rulemaking. Frequently the number of parties constituting a single interest is small and existing members are known. In any event, whether their number is great or small, they may often gain or lose with relative finality in the rulemaking proceeding itself. The content of the regulations when issued may be definite and the consequences of noncompli-

On-the-record rulemaking does, in some circumstances, possess the advantage of resolving at one time all of the claims of various interest groups concerned with the substance of a proposed rule. When the interests of identifiable persons or groups sharply clash over disputed issues of fact or policy, and when each of these interest groups is aware of the impact of a proposed rule and is capable of vigorously asserting its position in the rulemaking proceedings,[13] an on-the-record proceeding is appropriate. Such a proceeding allows each interest to present its own affirmative case and critique the positions of the opposing groups. Informed by the information and arguments that this basically adversarial procedure has elicited and tested, the agency is able to act. Judicial review should then swiftly follow because all of the affected interests have participated in the rulemaking proceeding and can effectively point out to the court any deficiencies in the proceedings or in the agency's response to them as embodied in the final rule.[14]

The feasibility of an adversarial on-the-record proceeding may be impaired, however, when the issues are complex and many-faceted.[15] The greater the number of disputed issues, the more sides of each issue, and the more the resolution of each issue is inextricably intertwined with other related and similarly complex issues, the greater will be the demand placed

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ance severe, such as the loss of the right to do business. Under these circumstances it may be desirable to let affected parties treat the rulemaking proceedings as adversary, so that all the information, conclusions, and arguments submitted to the agency may be publicly disclosed to opposing interests which may answer, explain, or rebut.

FINAL REPORT, *supra* note 11, at 108-09.

13. *But see* note 17 *infra* and accompanying text.

14. *See, e.g.*, Chrysler Corp. v. Department of Transp., 472 F.2d 659, 669-71 (6th Cir. 1972).

15. According to the authors of the FINAL REPORT:

> The application of the procedures of a judicial trial to administrative rule making is limited . . . by the distinctive characteristics of rule making proceedings. The issues are normally complex and numerous; the parties may be diverse and not alignable into classes; the outcome will involve a judgment concerning the consequences of rules to be prescribed for the future and a discretion in devising measures to effectuate the policies of the statute. These factors differentiate these proceedings from the normal judicial trial in which adversary hearings are traditionally employed and accordingly limit the possibility of defining issues in advance, of addressing evidence to them, of permitting systematic cross-examination, and of stating the findings and conclusions fully.

FINAL REPORT, *supra* note 11, at 109.

For discussions of so-called "polycentric" controversies, see Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues*, 71 MICH. L. REV. 111, 116-20 (1972); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978).

upon the agency's managerial capabilities. At some point, these demands may exceed the agency's ability to manage within the confines of an adversarial on-the-record format.[16]

Other factors may also lessen the appropriateness of an on-the-record format. For example, when the interests affected are diverse, scattered, and unorganized, the affected groups may be unable to perform the demanding role that on-the-record proceedings contemplate. Neither these proceedings nor the resulting rules will then adequately reflect the concerns of these unorganized interest groups.[17] Indeed, a lack of organization may not only impair the ability of such groups to participate fully in the rulemaking proceedings, but may also impede the effective receipt of actual notice by affected persons, first, of the commencement of rulemaking proceedings and later, of the promulgation of rules pursuant to those proceedings.[18]

Finally, rules that adversely affect scattered and unorganized interests seem inappropriate candidates for judicial review confined to the rulemaking record. Because such interests are unlikely to have participated vigorously in the rulemaking proceedings, they will have contributed little or nothing to that record and hence will be disadvantaged in the contentions open to them on review.[19] Moreover, some contemporary statutory formats that combine the on-the-record approach with a short time limitation governing petitions for judicial review[20] further disadvantage unorganized groups. Under such statutes,

16. See Professor Jaffe's discussion of the procedural problems raised by the doctrine of Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945), in L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 445 (1965).

17. *See* Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511-23 (1969).

18. *See* Adamo Wrecking Co. v. United States, 434 U.S. 275, 283 n.2 (1978). *See also* Yakus v. United States, 321 U.S. 414, 433-34 (1944).

19. *See* text accompanying notes 11-12 *supra*. *See also* National Welfare Rights Organization v. Finch, 429 F.2d 725, 736-37 (D.C. Cir. 1970).

20. *See, e.g.*, Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(e) (1976); Securities Acts Amendments of 1975, 15 U.S.C. § 78y(b) (1976); Flammable Fabrics Act, 15 U.S.C. § 1193(e) (1976); National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1394(a) (1976); Consumer Product Safety Commission Improvements Act of 1976, 15 U.S.C. § 2060(a) (1976); Toxic Substances Control Act, 15 U.S.C. § 2618(d) (1976); Endangered Species Act Amendments of 1978, 16 U.S.C. § 1536(n) (Supp. III 1979); Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(f) (1976); Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 816(a)(1) (Supp. II 1978); Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1369(b)-(c) (1976); Uranium Mill Tailings Radiation Control Act of 1978, 42 U.S.C. § 2022(c)(2) (Supp. II 1978); Clean Air Act Amendments of 1977, 42 U.S.C. § 7607(b)(1), § 7607(d)(3)-(7) (Supp. II 1978); Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1349(c)(3), (5)-(6) (Supp. II 1978).

the failure to seek "direct" review within the prescribed period may preclude challengers from seeking judicial review[21] or severely limit their ability to obtain the relief that they seek.[22] Unorganized interests are unlikely to be able to act within the prescribed time period or even to learn of their formal opportunities for judicial review.

III. THE SUPREME COURT'S APPROACH AND THE AUERBACH PROPOSAL: AN OVERVIEW

The Supreme Court's recent reaffirmation of an apparently universal requirement that judicial review take place on the "administrative record"[23] and its accompanying prohibition against reviewing courts ordering cross-examination or other trial-type procedures in informal rulemaking proceedings appear designed to simplify the rulemaking process at the administrative level.[24] The Court apparently believes that judicial review of informal rulemaking best takes place exclusively on an administrative record that has been prepared in proceedings over which the agency concerned has sole control.

The Court's attempt at simplification of informal rulemaking proceedings rests upon certain problematic assumptions, however. One such assumption appears to be that persons objecting to the validity of rules will be able to assert their positions effectively in the comment proceedings under procedures there available to them. On the surface, Justice Rehnquist seems to have concluded for the Court that testimony and cross-examination are rarely necessary to a challenger's attack on a rule. Indeed, Rehnquist almost seems to have attributed

21. See the discussion of the implications of a short limitations period governing petitions for direct review of rulemaking for later challenges to the validity of a rule in enforcement proceedings in Adamo Wrecking Co. v. United States, 434 U.S. 275, 278-85 (1978), and Atlantic & Gulf Stevedores, Inc. v. Occupational Safety & Health Review Comm'n, 534 F.2d 541, 550-51 (3d Cir. 1976). In each of the cited cases, challenge to rule validity was permitted in an enforcement proceeding. In *Adamo* the Court expressed reluctance to cut off review and therefore construed the statute narrowly to allow review in the case before it. The Court indicated, however, that certain types of rules, issued under other provisions of the Act before it, would be unreviewable after the short time period for petitioning for direct review had passed. In the *Atlantic & Gulf Stevedores* case, the court permitted direct review of a rule after the time had run for direct review, but placed the burden of establishing the invalidity of the rule upon the challenger, a burden which the challenger would not have borne in a direct review proceeding. *See* 534 F.2d at 551-52.

22. *See* the discussion of *Atlantic & Gulf Stevedores*, note 21 *supra*.

23. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549 (1978).

24. *Id.* at 546-48.

this conclusion to Congress through its enactment of section 553 of the Administrative Procedure Act,[25] even though it was not until the 1970s that the courts imposed upon section 553 the function of creating an exclusive record for the judicial review of rules.[26] Although Rehnquist concedes that the Constitution might sometimes require trial-type procedures in those rulemaking proceedings that are to serve as an exclusive basis for judicial review,[27] his language suggests that this would rarely be the case.[28] Rehnquist's mandate for review on the administrative record[29] is even more problematic because such a mandate assumes that the advantages that review on the record undoubtedly possesses in some regulatory circumstances are typically present in all rulemaking circumstances.

These problematic assumptions demand that the relationship between rulemaking procedures and judicial review of rulemaking be reassessed. One recent reassessment has been made by former dean Carl Auerbach, who has argued that judicial review on a record of a protest proceeding brought before an agency by an individual protestant would provide a more workable format than the present on-the-rulemaking-record approach. Auerbach's proposal is designed to free informal rulemaking from the constraints that review on-the-record has imposed and yet provide reviewing courts with a workable record on which to base their review. Indeed, a virtue of

25. Administrative Procedure Act, Pub. L. No. 89-554, § 553, 80 Stat. 378 (codified at 5 U.S.C. § 553 (1976)). *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. at 546.

26. The developments through which the courts imposed this new role on section 553 and thereby drastically altered the mechanics of both informal rulemaking and judicial review of informal rulemaking are described in Auerbach, *supra* note 1, at 31-38; Gifford, *The* Morgan *Cases: A Retrospective View*, 30 AD. L. REV. 237, 256-70 (1978); Nathanson, *supra* note 10, at 746-70.

27. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 542 & n.16 (1978). *See also* Williams, *"Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401, 413 (1975).

28. Rehnquist's extended discussion of the need for agencies to control their own procedures implies that the exceptions he recognizes would arise only infrequently. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519, 542-49 (1978).

29. We . . . remand so that the Court of Appeals may review the rule as the Administrative Procedure Act provides. We have made it abundantly clear before that when there is a contemporaneous explanation of the agency decision, the validity of that action must "stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration."

Id. at 549 (quoting Camp v. Pitts, 411 U.S. 138, 143 (1973)).

Auerbach's proposal is that it would produce a better focused and more coherent record.[30]

A brief discussion of several models of rulemaking and judicial review of rulemaking will provide a foundation for comparing Auerbach's proposed review on the record of a protest proceeding with Rehnquist's imposition of review on the record of the original agency rulemaking proceeding.

IV. SIX ALTERNATIVE MODELS OF AGENCY RULEMAKING PROCEDURES

The first model of agency rulemaking procedures is the traditional one.[31] The agency uses notice-and-comment procedures for informational purposes only, and the rules created are subject to collateral attack[32] in enforcement, injunctive, or declaratory proceedings. In the traditional model, there is no exclusive rulemaking record; the record for judicial review is compiled in the proceedings collaterally attacking the rule. In these collateral proceedings an indefinite number of people might object to the rule and might challenge its factual premise.[33] Because the doctrine of res judicata binds only persons in privity with each other,[34] the traditional model theoretically allows an indefinite number of lawsuits relitigating essentially the same factual issues, a result contrary to efficient administration. In addition, because this first model permits full evidentiary hearings in court challenges, it is inconsistent with the Court's mandates in the *Overton Park* line of cases[35] that insist

30. *See* Auerbach, *supra* note 1, at 61, 63-64; Gifford, *supra* note 26, at 284.

31. It is traditional in the sense that it describes rulemaking and rulemaking review in the manner envisioned by the drafters of the Administrative Procedure Act. *See, e.g.*, Auerbach, *supra* note 1, at 21-23, 24-26. Mandatory notice-and-comment procedure was an innovation of the Administrative Procedure Act, *see id.* at 21, although prior to its enactment many agencies had engaged in various forms of consultation with affected interests and/or had held legislative-type hearings before issuing rules. *See* FINAL REPORT, *supra* note 11, at 103-08.

32. *See, e.g.*, FINAL REPORT, *supra* note 11, at 115-16; Auerbach, *supra* note 1, at 24.

33. That is, they might challenge the set of factual assumptions on which the rule is based. For a discussion of the evolution of judicial review of the factual premises underlying agency rules, see Gifford, *Rulemaking and Rulemaking Review: Struggling Towards a New Paradigm*, 32 AD. L. REV. 577, 580-95 (1980).

34. *See, e.g.*, RESTATEMENT OF JUDGMENTS § 83 (1942).

35. Camp v. Pitts, 411 U.S. 138, 142, 143 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 755-56, 758 (1972); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971). *See also* NBC v. United States, 319 U.S. 190, 227 (1943); Acker v. United States, 298 U.S. 426, 434 (1936); Tagg Bros. & Moorehead v. United States, 280 U.S. 420, 443-44 (1930).

upon judicial review on an administrative record prepared in comment proceedings.

In the second model, although the agency uses notice-and-comment procedures for informational purposes only and the rules are again subject to collateral attack in enforcement, injunctive, or declaratory proceedings, review is exclusively on the administrative record.[36] Persons objecting to rules on the basis of evidence or other information must present that material in the comment proceeding, but challengers may present critiques of the analyses incorporated into the agency's stated rationale directly to the court.[37] Judicial review under this model is reminiscent of review as described in *Overton Park* and its progeny because the agency action is judged only by the matter in the administrative record but the person challenging the agency action is free to argue that the agency's rationale and its supporting props are inadequate to sustain the action as rationally based.[38] To the extent that the agency bears the burden of establishing the reasonableness of its rule,[39] however, this model would exacerbate the administrative problems created under the traditional model.[40] An indefinite number of people could still have the opportunity to challenge the ultimate factual conclusions underpinning the rule by challenging the adequacy of their analytical support structures, but the exclusive rulemaking record would restrict the agency to the factual support that it offered at the time of the rule's promulgation. The agency would thus be cast in the position of defending its performance against an indefinite number of challengers who have the advantages of hindsight and the cumulative experience of previous challengers.[41]

36. *See, e.g.*, Chrysler Corp. v. Department of Transp., 472 F.2d 659, 669 (6th Cir. 1972). *See also* City of Chicago v. Federal Power Comm'n, 458 F.2d 731, 744 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972).

37. To the extent that this second model allows objectors to raise objections in court that were not initially made before the agency, it is inconsistent with the general mandates of cases such as Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). Even in that case, however, the court found an exception pursuant to which it could consider objections made for the first time in court. *Cf.* International Harvester Co. v. Ruckleshaus, 478 F.2d 615, 632 (D.C. Cir. 1973) (court reviews EPA methodology even though no comment on methodology was made in agency proceeding).

38. *See* note 29 *supra* and accompanying text.

39. *See* Gifford, *supra* note 33, at 593-94.

40. *See* text accompanying notes 33-34 *supra*.

41. Whether an agency could actually be placed in the awkward position described depends upon whether the courts would treat this evaluating function as sufficiently "factual" to fall within the scope of the doctrines of res judi-

The third model also requires an exclusive record for agency action and for judicial review. This model substantially reduces the administrative disadvantage created in the second model, however, by limiting the arguments that objectors can make in court to those that they have previously made before the agency in the rulemaking proceeding.[42] Such a limitation is consonant with review on an exclusive rulemaking record because it concentrates objections to rules in the rulemaking proceedings.[43] The agency's disadvantage is also reduced by limiting the time period in which challenges to rules can be made in court[44]—an appropriate limitation to the extent that all serious objections have already been initially expressed in the rulemaking proceeding.

In this third model, interested and affected persons have the right to submit written comments on proposed rules under section 553 of the Administrative Procedure Act (APA) or other equivalent statutory provisions, but further participatory opportunities in rulemaking are dependent upon agency discretion or upon special statutory procedures.[45] Direct review

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cata and collateral estoppel rather than within the broader scope of the doctrine of stare decisis. *See* Fuchs, *Agency Development of Policy Through Rule-Making*, 59 NW. U.L. REV. 781, 805 n.119 (1965).

42. *See, e.g.*, Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 394 (D.C. Cir. 1973).

43. *See also* Adamo Wrecking Co. v. United States, 434 U.S. 275, 285 (1978); Yakus v. United States, 321 U.S. 414, 432-44 (1944); Bowles v. Willingham, 321 U.S. 503, 520-21 (1944); Chrysler Corp. v. Department of Transp., 472 F.2d 659, 670 (6th Cir. 1972).

44. Statutes providing for so-called "direct" judicial review of agency rulemaking typically establish a short (e.g., 60 days) time limit within which that review may be sought. *See, e.g.*, Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(e)(1)(A) (1976) (60 days); Securities Acts Amendments of 1975, 15 U.S.C. § 78y(b)(1) (1976) (60 days); Flammable Fabrics Act, 15 U.S.C. § 1193(e)(1) (1976) (60 days); National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1394(a)(1) (1976) (60 days); Consumer Product Safety Commission Improvements Act of 1976, 15 U.S.C. § 2060(a) (1976) (60 days); Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(f) (1976) (60 days); Federal Mines Safety and Health Amendments Act of 1977, 30 U.S.C. § 816(a)(1) (1978) (30 days).

A time limit on judicial review of a rule seems inappropriate when significant numbers of persons affected adversely by the rule are unlikely to become aware of its existence until the time limit has expired. *See* Adamo Wrecking Co. v. United States, 434 U.S. 275, 283 n.2 (1978). If, however, the potential objectors to the rule are likely to be aware of, and indeed participate in, the rulemaking proceedings, then such a time limit will not foreclose significant numbers of persons from seeking review.

45. In this respect, this third model is consistent with the mandates of Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 547 (1978).

takes place on the administrative record,[46] and the court assesses the rationality of agency action in light of the information provided by the rulemaking record. The scope of review conforms to the description of a reviewing court's duties contained in the *Overton Park* opinion.[47] Such review can properly be characterized, therefore, as rationality review. But because that review closely follows the details of the agency's reasoning from matters in the record to ultimate factual conclusions, it also seems consistent with "substantial evidence" review.[48] This third model is consonant with recent regulatory statutes[49] such as the Occupational Safety and Health Act of 1970 (OSHA).[50] It is also largely consistent with the assumptions underlying Justice Rehnquist's opinion in *Vermont Yankee*.[51]

The fourth model not only allows interested and affected persons to submit written comments on proposed rules, but also gives them the right to use evidentiary-hearing procedures (including the right to cross-examine witnesses) on issues for which such procedures are especially appropriate. This model's structure thus resembles that built into the Federal

46. *See* Vermont Yankee Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549 (1978); Camp v. Pitts, 411 U.S. 138, 142-43 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756, 758 (1972); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419-20 (1971).

47. Thus the court should decide whether the agency has acted within the scope of its authority, and in this connection should determine whether the agency could have reasonably believed in the factual premise on which its rule was based. The court should also decide whether the agency decision was based on a "consideration of the relevant factors" and whether the agency egregiously misweighed them. Finally, the court should decide whether the agency's decision was made in a procedurally correct manner. *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416-17 (1971).

48. "Substantial evidence" review has sometimes been understood as consonant with greater judicial involvement in tracing the logic of agency reasoning to its ultimate factual conclusions than has "rationality" review. For a discussion of the evolution of the relationship between the standards, see Gifford, *supra* note 33, at 580-84. *See also* Industrial Union Dep't v. Hodgson, 499 F.2d 467, 473 (D.C. Cir. 1974); Associated Indus. of N.Y. State, Inc. v. United States Dep't of Labor, 487 F.2d 432, 349-50 (2d Cir. 1973); Gifford, *supra* note 26, at 265-66; Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 540-41; Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185, 247-48 (1974).

49. It is consonant with recent regulatory statutes insofar as the substantial-evidence review imposed by these statutes coalesces with the probing type of rationality review described in *Overton Park*. *See* Gifford, *supra* note 26, at 265-66.

50. 29 U.S.C. §§ 651-678 (1976 & Supp. II 1978).

51. *Vermont Yankee*'s contemplation of review on the "administrative record" pursuant to "the appropriate standard for review" and its focus upon preserving the efficiencies of informal rulemaking by forbidding the courts to impose extra-statutory procedures on the agencies are consistent with this third model. *See* 435 U.S. at 542-49.

Trade Commission Improvements Act.[52] Under this model direct review of rulemaking takes place on the "administrative record."[53] The rationality of agency action is assessed by the reviewing court in the light of the information provided by the rulemaking record, or, alternatively as many of the newer regulatory statutes provide,[54] agency action is assessed—at least on factual questions—under a substantial-evidence criterion.

This fourth model as so far described contains a latent ambiguity concerning the types of issues for which cross-examination would be allowed, however. While, at a minimum, the fourth model contemplates that testimonial evidence about the occurrence of relevant physically perceivable events[55] would be subject to cross-examination,[56] the description of the fourth model has not yet specified whether cross-examination would be allowed to reveal errors in scientific analysis[57] or to clarify the bases for the conclusory findings relied upon by the agency as justifications for its rule.[58] Although in practice cross-examination for these latter purposes would blend together, two variations of this model can be hypothesized. In one, cross-examination on matters of scientific analysis is allowed when such examination is designed to disclose logical errors. The other variation allows, in addition, the cross-examination of witnesses who tender conclusory testimony on crucial ques-

52. 15 U.S.C. § 57a(c) (1976).

53. *See* note 46 *supra*. *See also* 15 U.S.C. § 57a(e) (1976).

54. *E.g.*, Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(e)(3)(A) (1976); Securities Acts Amendments of 1975, 15 U.S.C. § 78y(b)(4) (1976); Flammable Fabrics Act, 15 U.S.C. § 1193(e) (1976); Consumer Product Safety Commission Improvements Act of 1976, 15 U.S.C. § 2060(c) (1976); Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(f) (1976); Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 816(a)(1) (Supp. II 1978).

55. Such testimony, for example, might concern whether the observer did or did not remain in the room during the time at which a chemical reaction occurred.

56. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(e)(3)(B) (1976); H.R. REP. No. 1107, 93d Cong., 2d Sess. 46, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7728.

57. Professor Williams believes that on methodological issues other procedures may be more productive than cross-examination. *See* Williams, *supra* note 27, at 437-40, 443-45.

58. It was the conclusory testimony of Dr. Pittman about the environmental effects of nuclear waste storage and the "complete absence of any probing of its underlying basis" that was a primary cause of Judge Bazelon's dissatisfaction with the Nuclear Regulatory Commission proceeding involved in the *Vermont Yankee* litigation. *See* Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n, 547 F.2d 633, 651 (D.C. Cir. 1976), *rev'd*, 435 U.S. 519 (1978).

tions when the purpose of such examination is to clarify the bases for those conclusions.

Model four and its two variations respect the limited constitutional right[59] of persons affected by rulemaking to challenge the factual premises of rules by allowing the use of cross-examination and other evidentiary hearing procedures on appropriate issues.[60] The exclusive rulemaking record aspect of this procedure, however, requires that the procedural rights of affected persons be exercised in the rulemaking proceedings. Accordingly, the validity of the entire rulemaking proceeding will be jeopardized by the wrongful refusal of the agency to accord a procedural right—such as cross-examination—demanded by a participating party. Because of the serious consequences of an erroneous denial of such a demand, agencies will be pressured to resolve doubtful questions in favor of allowing cross-examination and other judicialized procedures. Thus, as Justice Rehnquist has feared,[61] this model of rulemaking would become increasingly skewed towards judicialized procedures and away from the efficiencies of informal procedures.

The fifth model is similar to the third model, except provision is made for dealing in the course of judicial review with those objections to rule validity that can effectively be made only through evidentiary hearing procedures. Under this model it is assumed that Congress intended to preserve, as much as possible, the efficiencies of notice-and-comment rulemaking. It is also assumed that rule validity is determined by the correspondence of the agency's factual predicate with facts in the actual world as they can be discovered through evidentiary hearing procedures. Rule challengers asserting an error in the agency's factual premise, demonstrable only through evidentiary hearing processes, would have a statutory right to use such evidentiary processes in court proceedings.[62] This model

59. *See* Nathanson, *supra* note 10, at 757.

60. Of course, this evidentiary hearing procedure imposes a substantial burden upon the rulemaking proceedings that must both preserve the rights of those persons affected and preserve society's interests by efficiently producing informed and justified rules. The societal interests were the focus of Judge Wright's plea to abandon the trend of the hybrid cases towards increased judicialization of rulemaking proceedings—a plea to which the Court in *Vermont Yankee* seems to have responded. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 547 & n.20 (1978).

61. *See id.* at 547.

62. In contrast to model four and its variations, this model does not allow evidentiary hearing procedures in the rulemaking proceedings, but it allows them in a court proceeding attacking rule validity. Unlike the first or tradi-

differs from the third model in that it provides a limited use for evidentiary hearings in proceedings attacking rule validity. It differs from the fourth model and its two variations in that evidentiary hearing procedures are not available in the rulemaking proceedings, but are available only in a proceeding attacking rule validity in court. It differs from the first (or traditional) model in that evidentiary-hearing procedures are available to attack rule validity only on those factual issues on which notice-and-comment procedures are demonstrably inadequate. This model is basically consistent with *Vermont Yankee*, because it preserves the efficiencies of informal procedure, but it also adopts a judicial analogue to the administrative-level procedures formalized by the Office of Price Administration (OPA) almost four decades ago.[63] The OPA procedures provided a limited right to evidentiary hearing procedures to the extent that particular objectors could demonstrate that such procedures were necessary to ventilate the issues that they were raising.[64]

The sixth model assumes that Congress intended agencies to act upon the basis of the best information available through notice-and-comment proceedings, and that the agency action thus authorized should not be subject to attack in evidentiary hearings. Since persons objecting to rule validity would have no statutory right to demonstrate the inaccuracy of the agency's factual premises through evidentiary hearings, the sole question would be whether such persons would have a limited constitutional right to attack the factual underpinnings of the rule through such procedures. Any such constitutional right would be a limited one, however. Nathanson's contention[65] that Congress could not insulate agency action from judicial scrutiny implicitly admits that agency action would have to be reviewed only for rationality. A rationality criterion would be satisfied if the person challenging the rule failed to disprove the existence of the agency's factual predicate in an evidentiary

tional model, this model allows evidentiary hearings only on those factual issues on which notice-and-comment procedures are demonstrably inadequate.

63. *See* note 70 *infra*.

64. Thus, under the OPA procedures, oral hearings were conditioned upon a showing that a purely documentary presentation by the protestant would be inadequate for "the fair and expeditious disposition of the issues." *See* Direct Realty Co. v. Porter, 157 F.2d 434, 437 (Emer. Ct. App. 1946). *See also* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 631, 649 (D.C. Cir. 1973); American Airlines, Inc. v. Civil Aeronautics Bd., 359 F.2d 624, 632-33 (D.C. Cir. 1966).

65. Nathanson, *supra* note 10, at 757.

hearing.[66] In some circumstances such a criterion would also be satisfied if that person failed to prove that the comment proceedings were inadequate to provide the agency with a reasonable basis for belief in its factual predicate.[67] This model, therefore, is basically the third model modified to permit evidentiary hearings only to the minimum extent that they are constitutionally required.

The fifth and sixth models contemplate an awkward bifurcated system of review under which agency action is reviewable on the rulemaking record, but, on the petition of a party seeking review, the rulemaking record may be supplemented by evidentiary hearing procedures. The petitioning party must, however, establish to the satisfaction of the reviewing court that such supplementary procedures are necessary to prove the lack of reasonable grounds for the agency action in question. Incident to a petition to supplement the rulemaking record, the reviewing court must rule that the issues sought to be litigated could not have been effectively litigated in the comment proceedings through the presentation of documentary materials.

In making such a determination, the court might require the assistance of the agency,[68] remanding to the agency: first, for the agency's own determination as to whether the issues in question could have been fully explored in the rulemaking proceedings, and second, if the agency rules in favor of the petitioner's procedural claim, for the holding of an evidentiary hearing on the issues which the petitioner has raised. Such a supplementary evidentiary hearing, if one is held, would be limited to the issues raised and the proof and arguments supplied by the petitioner, and the agency's rebuttal of the petitioner's case. The supplementary evidentiary hearing, therefore, would have a narrow focus and would permit the agency to limit its rebuttal solely to the issues and material presented by the petitioner. Moreover, to the extent that the agency and

66. This is the procedure contemplated by the authors of the FINAL REPORT through which rules are tested for rationality. *See* FINAL REPORT, *supra* note 11, at 115-16. *See also* Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185 (1935).

67. In *Overton Park*, the Secretary's decision was tested, *inter alia*, under a reasonable-belief standard. *See* 401 U.S. at 416. *See also* Air Line Pilots Ass'n v. Quesada, 276 F.2d 892, 898 (2d Cir. 1960).

68. Although the determination as to whether the comment proceedings adequately explored the issues involved might ultimately have to be made by the court, the court might nonetheless find that a prior evaluation of the adequacy of the comment proceedings by the agency would assist it in making its own determination. *See* Far East Conference v. United States, 342 U.S. 570, 574-75 (1952).

the reviewing court were properly insistent that all issues capable of resolution through comment proceedings were so resolved, the number of supplementary proceedings actually held would be kept to a minimum. Since the consequence of such insistence would be to relegate issues to the original rulemaking proceedings, parties would be pressured to litigate fully with documentary materials in the rulemaking proceedings. Thus, it would be increasingly difficult for challengers later to complain that certain issues could not have been adequately dealt with in the rulemaking proceedings.

V. THE AUERBACH CRITIQUE

Professor Carl Auerbach's proposal,[69] suggesting the Office of Price Administration (OPA) model[70] as an alternative to current rulemaking developments, is a powerful one. Indeed, the power of the Auerbach proposal is emphasized when it is considered against the background of other approaches, such as those embodied in the six models discussed above. Under Auerbach's proposal, agency rules would be promulgated following notice-and-comment proceedings designed not to produce a record for judicial review, but rather to gather information upon which the agency could base its decisions.[71] People seeking review of a rule would first lodge with the agency that had promulgated the rule, a protest that challenged either the rule's application or its overall validity. The protestants would be required to accompany their protest with documents and other papers constituting their case. The agency could then either grant the protest, deny it, or order a hearing on the protest. If the agency denied the petition, it would be required to submit its own material and reasons for the denial. The record for judicial review then would consist of the protestants' submissions and the agency's reply with its accompanying supporting material. If the agency denied the protest after a hearing, the record would also include the record of that hearing. Auerbach's proposal is thus designed to recapture the simplicity, flexibility, and efficiency of notice-and-comment proceedings while also producing more manageable and focused records for judicial review.

69. Auerbach, *supra* note 1, at 61-68.

70. OPA Revised Procedural Regulation No. 1, Procedure for Issuance, Adjustment, Amendment, Protest and Interpretation of Maximum Price Regulations, art. V, § 34, 9 Fed. Reg. 10,476, 10,479-80 (1944). *See also* Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 204, 56 Stat. 23.

71. Auerbach, *supra* note 1, at 61.

Although Auerbach's proposal differs from the most recent approach to rulemaking and rulemaking review articulated for the Supreme Court by Justice Rehnquist, it is similar in many ways to procedures in vogue in the two decades following the enactment of the Administrative Procedure Act. Prior to the recent rulemaking-on-the-record developments,[72] agencies promulgated rules after notice-and-comment proceedings. People could challenge the validity of a rule in preenforcement injunctive or declaratory judgment proceedings when the rule was enforced against them in a penalty or licensing proceeding, or when they could show that the rule was forcing significant behavioral changes upon them.[73] In these cases, reviewing courts were able to pass upon the rule's validity by examining the rule, the statutory objectives, and the agency's reasons for its rule. When the challenge went to the validity of the agency's factual premise,[74] the reviewing court could obtain a record from one of several procedural variations.

Under one such variation, a court could first require that a petition be filed with the agency seeking either the rule's amendment or repeal, or a waiver of the rule's application to the petitioner, as a prerequisite to bringing a factually-based challenge to the validity of a rule in court.[75] To the extent that

72. *See* note 26 *supra* and accompanying text. *See generally* Auerbach, *supra* note 1, at 26-30; Gifford, *supra* note 26, at 259-70; Nathanson, *supra* note 10, at 724-46; Verkuil, *supra* note 48, at 193-230; Williams, *supra* note 27, at 411-25.

73. *See* Abbott Laboratories v. Gardner, 387 U.S. 136, 152 (1967).

74. *See* note 33 *supra* and accompanying text.

75. In United States v. Storer Broadcasting Co., 351 U.S. 192, 201-04 (1956), the Court had approved the Federal Communication Commission's (FCC) elimination of licensing hearings in certain classes of cases by deciding in advance and through rulemaking those policy issues that would otherwise be involved in the cases. But the Court indicated that the statutory hearing requirement was being respected because an affected license applicant would nonetheless be entitled to a hearing before his application was refused if that applicant set out, in his application, adequate reasons why the rules in question should be waived or amended. *Id.* at 205. The Federal Power Commission (FPC) adopted this technique and also successfully persuaded the courts that its general rules were not reviewable until they were applied in certification or rate proceedings. *See* Texaco, Inc. v. FPC, 317 F.2d 796, 804-05 (10th Cir. 1963), *rev'd on other grounds*, 377 U.S. 33 (1964). Even in those proceedings, however, the courts were unable to review factually-based challenges to the Commission's rules because of the absence of a record upon which such review could be predicated. *See id.* at 805-07; Superior Oil Co. v. FPC, 322 F.2d 601, 618-19 (9th Cir. 1963). The *Superior Oil* opinion indicated that a certificate applicant might have obtained an evidentiary hearing on the propriety of waiving the rules on his application, if he had petitioned for a waiver. But the court did not deal satisfactorily with the procedure available for an across-the-board attack on rule validity. A contemporaneous comment suggested that the proper procedure to launch a factually-based attack on rule validity would be to petition

this approach effectively forced objectors to petition the agency to institute rulemaking proceedings, petitioners would have been asking the agency to open those proceedings to all interested persons. Petitioners would have converted their own particularistic challenges into a general proceeding in which their claims would be engulfed by the submissions of many other interested persons.[76] If the agency denied the original challengers' petition, however, the procedural challenge would have remained focused upon the challengers' own particular objections to the rule.

Had the agency responded by instituting rulemaking proceedings, and had those proceedings not revoked the objectionable rule, the petitioners could have sought direct review[77] of the rulemaking proceeding on a record that would have consisted of the principal documents introduced into the notice-and-comment proceeding.[78] Had the agency refused to institute rulemaking proceedings, the agency's refusal would have been subject to court review on a record consisting of the petitioners' offers of proof, the agency's response, and the record of any incidental agency proceeding inquiring into the wisdom of the petitioners' request to institute rulemaking proceedings.[79] If the agency had supported its refusal to institute rulemaking proceedings with documented support for the challenged rule, judicial review of that refusal would have resembled judicial review of the OPA proceedings in which the court reviewed indi-

for amendment or repeal of the challenged rule. *See* 16 STANFORD L. REV. 695, 702-03 (1964). This procedure seems most consistent with the positions of the FPC in the cited cases. Despite the absence of petitions to amend, repeal, or waive the rules, the rules involved in the cited cases were ultimately reviewed in judicial review of certification proceedings when the court called up the record of the rulemaking proceedings. *See* Pan American Petroleum Corp. v. FPC, 352 F.2d 241, 243-44 (10th Cir. 1965).

76. Rulemaking proceedings, if instituted, would be governed by section 553 of the Administrative Procedure Act, which establishes a procedure by which "interested persons" are accorded the right to participate after "[g]eneral notice" has been published in the Federal Register. 5 U.S.C. § 553 (1976).

77. Under then prevailing views, an agency rule might have been viewed as an "order" that would be reviewable if its impact upon the person seeking review was sufficiently immediate and injurious. *See, e.g.*, Columbia Broadcasting System, Inc. v. United States, 316 U.S. 407, 416-17 (1942).

Direct review of an order under the Hobbs Act was required to take place within 60 days. *See* 28 U.S.C. § 2344 (1970); text accompanying note 84 *infra*. Alternatively, an agency order might be directly reviewed under a special review statute at the instance of a "person aggrieved," again within a short limitations period. *See, e.g.*, Federal Communications Comm'n v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940).

78. *See* note 81 *infra*.

79. 16 STAN. L. REV. 695, 703 (1964).

vidual agency responses to separate rule challengers.[80] If, on the other hand, the agency had supported its refusal to institute new rulemaking proceedings by referring to the prior rulemaking proceeding that had given rise to the rule under attack, then the agency might have been required to supply the record of that earlier rulemaking proceeding so that the court could now assess its validity.[81]

This first procedural option contemplated that notice-and-comment procedure would have sufficed for exploration of factual questions underlying the rule.[82] This option may have resulted, however, in a judicially-conducted evidentiary hearing into the propriety of the agency's refusal to institute rulemaking proceedings—an evidentiary hearing in which the court itself explored the factual underpinnings of the challenged rule in the guise of ruling on the agency's refusal to institute those proceedings.[83]

Under a second major procedural variation, the court could—pursuant to the Hobbs Act[84]—have sent the case to a district court for an evidentiary hearing in which the factual questions underlying the rule would be explored. Or, again, the court could have remanded the case to the agency for the preparation of a rulemaking record.[85] The agency then could have

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80. *See, e.g.*, Auerbach, *supra* note 1, at 62-63.

81. *See* note 75 *supra*. *See also* Pan American Petroleum Corp. v. FPC, 352 F.2d 241, 245 (10th Cir. 1965) (court, in review of certification proceeding required the record of a prior rulemaking proceeding to be produced).

> [We] required the Commission to file the records compiled in the rulemaking procedures which resulted in Orders Numbers 232, 232A, and 242.
>
> . . . .
>
> . . . Some factual basis [for the regulation] must appear and we believe that the record before us affords that basis. . . . True the presentations do not take [the] form of an adjudicatory type hearing but the Supreme Court has said that is not necessary.

Id. at 243-44.

82. The Court has long taken the view that informal rulemaking procedures are a presumptively adequate means of establishing the factual base underlying agency rules. *See* United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956) (full hearing unnecessary); Pacific States Box & Basket Co. v. White, 296 U.S. 176, 186 (1935) (notice and "public hearing"). Those who wished to make a factually-based objection to the validity of a rule and who wished to have that objection explored in an evidentiary hearing might, therefore, have been required to make an affirmative showing as to why the objection could not be adequately explored through notice-and-comment proceedings.

83. *See generally* Fuchs, *supra* note 41, at 805, *quoted in* note 85 *infra*; 16 STAN. L. REV. 695, 703 (1964).

84. 28 U.S.C. § 2347 (1970).

85. According to Professor Fuchs:

> A party wishing to attack the validity of [a] regulation may . . . certainly do so on judicial review of an agency order based on the regula-

essentially repeated the rulemaking proceeding—which initially employed notice-and-comment procedures—using on-the-record procedures but confining the on-the-record procedures to a defense of its rule against the particular challenger.[86]

Some of these procedural variations resemble the review of rules under the OPA procedures and the Auerbach proposal: judicial review took place upon a record prepared in an agency proceeding concerned solely with the challenger's objection to the rule.[87] But if the agency had to repeat its informal rulemaking proceeding in an on-the-record format at the insistence of a challenger, were not the efficiencies of informal rulemaking destroyed? Perhaps not entirely, because the on-the-record proceeding could have been largely confined to documentary materials[88] by, for example, requiring that people who wish to employ evidentiary-hearing procedures show affirmatively why such procedures are essential to their case.[89] Limiting the scope of the agency on-the-record proceedings to the objections brought forward by persons seeking review—even when those on-the-record proceedings were held subsequent to informal proceedings—might still have produced an aggregate of administrative proceedings that was more flexible and directed than were some of the operations of the hybrid procedures in use immediately prior to the Supreme Court's *Vermont Yankee* decision.

Although the fifth and sixth models were described above as the most compatible with Justice Rehnquist's recent opinions for the Supreme Court,[90] these models contemplate that

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tion, unless a statute precludes review; and if the court needs facts on which to base its decision of the point, it can remand the proceeding to the agency for additional evidence or facts officially noticed to be placed in the record. In the end, therefore, the attacker gets his hearing on the issue of validity, relating to both the facts pertinent to that issue and, by way of argument before the agency or in court, to the issues of law.

Fuchs, *supra* note 41, at 805 (1965).

86. This would be similar to the OPA procedures where the agency reconsidered the validity of a price regulation in the light of the particular attack of the protestant. *See* Auerbach, *supra* note 1, at 63.

87. *See id.*

88. Recent commentators have repeatedly emphasized the flexibility of the APA on-the-record procedures which, pursuant to section 556(d), permit, in appropriate cases, proceedings to be confined to documentary materials. *See* 5 U.S.C. § 556(d) (1976). *See, e.g.*, Auerbach, *supra* note 1, at 19; Nathanson, *supra* note 10, at 727-28, 730.

89. This was the procedure followed under the OPA. *See* Direct Realty Co. v. Porter, 157 F.2d 434, 438 (Emer. Ct. App. 1946). *Cf.* United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956) (FCC appeal procedure).

90. *See* text accompanying notes 63-67 *supra*.

the administrative record prepared in informal rulemaking proceedings will be supplemented with evidentiary-hearing procedures when it is necessary to ventilate factual issues critical to the determination of rule validity. Should such supplementary proceedings be necessary, however, these models would conflict with Rehnquist's insistence that notice-and-comment proceedings not be burdened with additional judicially-imposed procedures.[91] Under models five and six, the agency would retain control over notice-and-comment proceedings, and the power of a reviewing court to order supplementary evidentiary-hearing procedures would be limited to contentions raised by the particular party seeking judicial review. Superficially, therefore, it might appear that the aggregate administrative proceedings would be more focused and would produce a better record for judicial review than the judicially-ordered hybrid procedures of the recent past.

Two comments, however, are in order. First, so long as the record of the informal rulemaking proceeding is exclusive for issues that could properly be ventilated in that proceeding, all objections to rule validity will, to the extent feasible, be forced into the comment proceedings,[92] thus preserving the present all-encompassing role of that proceeding. Only the few issues that cannot be forced into a comment format will be handled in the more focused supplementary proceeding. Second, insofar as current doctrines of ripeness facilitate preenforcement review[93] and statutes require that review be undertaken upon conclusion of the informal proceedings,[94] all parties seeking review will tend to do so at the same time. Moreover, to the extent that these parties have similar or overlapping objections to rule validity—a circumstance to be expected when challenges to rule validity are made prior to enforcement[95]—efficient handling of these challenges may call for consolidation,[96] especially of the evidentiary hearings of the supplementary proceedings.

91. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543-48 (1978).

92. *See* text accompanying note 68 *supra*.

93. *See* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967); Frozen Food Express v. United States, 351 U.S. 40 (1956). *See also* Auerbach, *supra* note 1, at 61-62.

94. *See* notes 43 & 44 *supra* and accompanying text.

95. Justice Fortas, dissenting in *Abbott Laboratories*, seems implicitly to suggest that preenforcement review tends to induce courts to see issues of rule validity in terms of "the abstract and the general" rather than in terms of "the facts of particular situations" which, in his view, are generally more relevant. *See* 387 U.S. at 200 (Fortas, J., dissenting).

96. Gifford, *supra* note 26, at 284.

Consolidation would tend to produce a wide ranging and less focused supplementary record.

VI. CONCLUSION: THE NEED FOR STUDY

This review of the Supreme Court's recent approach to judicial review, Auerbach's proposal, and a number of alternative models of rulemaking review ought to include the following observations. First, the OPA-type procedures proposed by Auerbach for current use were available prior to the birth of on-the-record informal rulemaking and were indeed a proper method for testing the validity of rules.[97] Some courts, however, failed to employ that machinery because they misunderstood the existing law and the available procedures under that law.

Second, the replacement of off-the-record informal rulemaking with on-the-record informal rulemaking places a greater strain on the informal proceedings because the preparation of a record for judicial review becomes one of the paramount objectives of the informal proceeding.[98] That increased strain is sometimes offset by the advantage of concentrating the final resolution of all issues connected with the formulation and validity of the rule in the on-the-record rulemaking and its immediate judicial review.[99] Thereafter, the rule can be administered with a minimum of procedural snags. Under such a scheme, on-the-record informal rulemaking may be an efficient method of administration. This procedural arrangement functions best, however, when the subject matter of the rule is one in which only a few identifiable persons are interested and when, therefore, such persons can be expected to participate actively in the rulemaking proceedings.[100] But even in these circumstances the speed and efficiency of the informal proceedings are undercut when the participants in an on-the-record

97. *See* text accompanying notes 80, 86-87 *supra.*

98. *See* Auerbach, *Administrative Rulemaking in Minnesota*, 63 MINN. L. REV. 151, 179 (1979). *See also* Gifford, *supra* note 26, at 282-87.

99. *See* Chrysler Corp. v. Department of Transp., 472 F.2d 659, 670 (6th Cir. 1972).

100. As the number of persons affected by a rule increases, the likelihood increases that significant numbers of them will fail to learn about, and therefore will fail to participate in, the rulemaking proceedings. Similarly, many such persons may even fail to learn about the existence of the rule after its promulgation until an enforcement action is brought against them. *Cf.* Adamo Wrecking Co. v. United States, 434 U.S. 275, 283 n.2 (1978) (small businesses subject to Clean Air Act can only protect themselves by daily review of proposed standards in Federal Register).

proceeding begin to employ cross-examination and other procedures of evidentiary hearings.

Third, *Vermont Yankee* has sought to restore the efficiency of informal proceedings by forbidding reviewing courts—except in extraordinary circumstances—from ordering more than comment procedures from agencies. Because that case also continued the insistence of prior Supreme Court cases on the integrity and exclusiveness of the administrative record[101] as the basis for judicial review of agency action, *Vermont Yankee* reinforces the tendencies of those decisions towards concentrating the resolution of rulemaking issues into a single administrative proceeding and the judicial review of that proceeding,[102] perhaps on a theory that such a procedural format is the most efficient. Implicit in the *Vermont Yankee* opinion, therefore, are two conclusions: 1) procedures of a more judicialized nature than comment procedures are rarely necessary,[103] and 2) when more judicialized procedures are necessary, they can take place in supplementary proceedings incident to judicial review.[104]

101. *See* Camp v. Pitts, 411 U.S. 138, 142-43 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756, 758 (1972); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 419-20 (1971).

102. This option, as has been noted, is taken by any statute which provides for direct review of rules within a short statutory limitations period.

103. Thus Justice Rehnquist ruled that only when confronted with "extremely compelling circumstances" or "constitutional constraints" should reviewing courts impose procedures on agency rulemaking other than the notice-and-comment procedures mandated by the Administrative Procedure Act. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 543 (1978). If the administrative record is to be used as the basis for judicial review and if the administrative record is to be a record of notice-and-comment proceedings, then the assumption must be that notice-and-comment proceedings are normally adequate to explore factual questions related to rule validity.

104. As employed in text, the term "supplementary proceedings" includes both those limited classes of remands in which a reviewing court can, consistently with *Vermont Yankee*, order the employment of additional procedures and those collateral attacks upon rule validity in which, again consistently with *Vermont Yankee*, a court could order the notice-and-comment records to be supplemented with additional procedures.

Under *Vermont Yankee*, the courts cannot normally compel an agency to employ procedures in addition to the notice-and-comment procedures mandated in section 553 and they are to avoid the deleterious effects of "Monday morning [procedural] quarterbacking." 435 U.S. at 547. Yet the courts can remand in the event of an inadequate record and, when "constitutional constraints" or "exceptionally compelling circumstances" require, they can mandate additional procedures. 435 U.S. at 539, 543. The *Vermont Yankee* mandate, therefore, substantially limits remands in which additional procedures are imposed upon agencies.

When Auerbach suggested his recent proposal,[105] he was concerned with restoring the efficiency and flexibility of informal rulemaking. Although Justice Rehnquist and the other members of the Supreme Court also wish to further these goals, they have proposed significantly different approaches for restoring that flexibility. Both Rehnquist and Auerbach would probably favor using documentary materials where possible and restricting the role of cross-examination in technical proceedings.[106] A crucial difference in their approaches, however, is whether challenges to the factual underpinnings of rules must be made exclusively in an on-the-record administrative proceeding in which all of the affected persons are expected to participate or to acquiesce, or whether separate challenges can be explored in administrative proceedings incident to rulemaking review where those proceedings are structured around the objections of the particular persons seeking review. Auerbach's and Rehnquist's approaches are largely based upon their own respective assessments of how each approach would further or retard administrative efficiency.[107] The respective merits of their proposals thus may vary with the subject matter, parties affected, and other contextual matters connected with different rules. Because the comparative advantages of the Auerbach and Rehnquist models depend upon variables such as these, it is likely that neither of these models will be superior in all circumstances. Indeed, as the prior discussion of a variety of other models has implicitly shown, the Rehnquist and Auerbach models are but two—more or less polar—models of an almost limitless variety of possible ones.

Unfortunately, while the administrative law literature is replete with historical, doctrinal, and conceptual discussions of rulemaking procedures and judicial review, it is sadly lacking

105. Auerbach, *supra* note 1, at 61-68.

106. *See* Auerbach, *supra* note 1, at 60-61; text accompanying notes 1-10 *supra*.

107. Thus Auerbach, drawing on the OPA experience, does not believe that subsequent protests and judicial review of protest proceedings would offset the efficiencies that would be gained from a return to off-the-record informal proceedings whose primary objective is to aid the agency in gathering information. Rehnquist, on the other hand, assumes that regulatory efficiency is optimized when doubts about rule validity are settled in judicial review of the rulemaking proceedings that is based upon the record of those proceedings. This latter approach probably is more efficient when rules are of a type that affect a few persons, identifiable in advance, who possess the competence and resources to defend their interest in the rulemaking proceedings and to seek direct review of those proceedings when appropriate. *Cf.* FINAL REPORT, *supra* note 11, at 108-11 (discussion of "adversary" hearings).

in evaluations of the organizational dynamics of rulemaking and rulemaking review.[108] Serious study of these dynamics in various settings is necessary to formulate sets of procedures that will foster efficiency, effectiveness, and fairness in each of those different settings. A typology[109] of the major variations of rulemaking and rulemaking review should first be developed. That typology should focus on the relationship of the subject matter to the kind of evidence or material submitted, the scope of the rule and economic impact of the rule upon affected persons, the number of participants in absolute terms and as a percentage of those affected, and the similarity or dissimilarity of issues raised by the several participants in the rulemaking proceedings. The number of persons seeking judicial review, the extent to which challenges are made on "factual" grounds, and the similarity or dissimilarity of arguments raised by such persons in the review proceedings should also be included in the typology. An empirically grounded study of official rulemaking behavior and of the procedural behavior of affected persons in various settings might disclose a number of recurring behavioral patterns. If so, it would facilitate the formulation of several sets of procedures, each of which could be designed to maximize efficiency, effectiveness and fairness in its respective setting.[110]

108. A limited attempt to incorporate such a perspective is contained in Gifford, *Decisions, Decisional Referents, and Administrative Justice*, 37 L. & CONTEMP. PROB. 3, 22-33 (1972). *See also* Gifford, *Communication of Legal Standards, Policy Development, and Effective Conduct Regulation*, 56 CORNELL L. REV. 409, 461-65 (1971).

109. *See, e.g.*, M. WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 92, 110 (1947).

110. Thus the present APA incorporates three basic types of administrative procedures—informal rulemaking, formal rulemaking, and formal adjudication—and within those categories permits significant variations of procedures. If the present three broad sets of procedures were replaced by other and more numerous sets of procedures, the Congress would be significantly assisted in specifiying the procedures to govern new regulatory statutes. Thus, for example, a study could show a need for six sets: 1) off-the-record notice-and-comment; 2) off-the-record notice-and-comment with some issues identified by the off-the-record proceedings for further development through on-the-record notice-and-comment proceedings; 3) on-the-record notice-and-comment proceedings; 4) multi-stage on-the-record notice-and-comment proceedings; 5) on-the-record notice-and-comment proceedings with evidentiary hearings for issues isolated by the notice-and-comment proceedings; and 6) evidentiary hearing proceedings. Although Congress has, for example adopted the fifth of the above procedural sets in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, 15 U.S.C. § 57a(c) (1976), the advisability of incorporating the more detailed content of these or alternative sets of procedure into a general administrative procedure act to assist the Congress in selecting procedures for application to new regulatory statutes would be best

Students of administrative law have always emphasized the variety among agencies and administrative tasks. Some, such as Robert Benjamin, have recommended against the adoption of administrative procedure acts on the ground that the diversity of administrative activity could not properly be forced into a small number of statutory categories.[111] The federal Administrative Procedure Act recognizes the variety of administrative behavior, first, by providing for three types of procedures (informal rulemaking, formal rulemaking, and adjudication) and, second, by giving the agencies wide flexibility within these categories to mold procedures to the issues before them. Yet there is little effective control over an agency's procedural choices. Courts cannot second-guess agencies without ultimately pressuring all proceedings into over-judicialized formats, as *Vermont Yankee* observes.

A study such as the one suggested would help to bring about a widespread recognition that the variety of procedural settings in which rulemaking presently occurs requires the development of several new sets of procedures—including accompanying formats for judicial review—that would both regularize procedures and provide for diversity. This suggested development of several new sets of rulemaking procedures for use in these newly identified settings would help to improve the efficiency, effectiveness and fairness of administrative proceedings and thereby to extract administration from the procedural morass into which it has sunk over the past fifteen years.

determined after a thorough evaluation of existing experience under various forms of present procedure.

111. 1 R. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 9-17, 24-36 (1942). *See also* FINAL REPORT, *supra* note 11, at 191-92. On New York's recently enacted administrative procedure legislation, see Gifford, *The New York State Administrative Procedure Act: Some Reflections Upon its Structure and Legislative History*, 26 BUFFALO L. REV. 589 (1977).